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No. 10-75

Supreme Court, U.S.
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In The
Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

FRANCIS BATTAGLIA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Ohio, Sixth Appellate District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court erred in granting summary judgment on liability where the only admissible evidence on causation showed that exhaust fumes from Conrail's locomotive resulted in Mr. Battaglia's adult-onset-asthma.

2. Whether this Court should grant the petition for certiorari to consider whether the Ohio Court of Appeals properly read the plain meaning of the applicable diesel exhaust regulation.

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STATEMENT OF THE CASE

Francis Battaglia retired from his long career as a brakeman, conductor, and locomotive engineer for Consolidated Rail Corporation (Conrail) in 2007, after he was diagnosed with adult-onset-asthma and advised by his doctor to avoid further exposure to diesel exhaust.[1] Mr. Battaglia brought an action in the Lucas County (Ohio) Court of Common Pleas against Conrail for his adult-onset-asthma under the Federal Employers' Liability Act, 45 U.S.C. § 51 (FELA), and the Federal Locomotive Inspection Act, 49 U.S.C. § 20701 (FLIA).

Mr. Battaglia sought summary judgment on his FLIA and FELA claims, relying on **sworn** deposition and affidavit testimony establishing that Conrail's defective locomotives exposed him to diesel exhaust from virtually the first day he began working for Conrail and that the daily exposure ultimately resulted in adult-onset-asthma. For example, his own testimony described the "blue smoke" and "black diesel oil" entering the locomotive cabs before ever entering the exhaust stacks, through holes in the floor, cracks in the doors, the windows, and the electrical compartment of virtually the entire fleet. Pet. App. 30a; Pl.'s Summary Judgment Mtn, Count II, Exhibit A at 73. Another witness, a fellow engineer,

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[1] Conrail's states that Mr. Battaglia was a smoker for 13 years (Pet 8), but neglects to mention that he stopped smoking some 31 years before contracting adult-onset-asthma Pet App. 8a ¶ 30.

testified that "the locomotives which we were required to operate were rarely maintained properly causing toxic diesel exhaust fumes to come in the cab through the firewalls; electrical cabinets; and even cracks in the floor," and that seals on the doors and windows of locomotive cabs almost always leaked, allowing diesel exhaust to enter the cabs. Pet. App. 30a.

In addition to diesel exhaust coming through the walls and floor, the evidence showed that some diesel exhaust would enter the locomotive cab because the exhaust stacks were not of "sufficient height . . . to prevent entry of products of combustion into the cab . . . " 49 C.F.R. § 229.43. Much of the diesel exhaust never even made it to the locomotive stacks.[2] As the Ohio Court of Appeals observed: "Appellant [Conrail] has never suggested that the conditions experienced by appellee [Battaglia] were in any way the result of unusual operating conditions, nor has it presented evidence contradicting [Mr. Battaglia's] assertion of exposure." Pet. App. 11a ¶ 39.

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[2] Other railroaders testified at trial that, over the course of their railroad careers, they had operated locomotives from virtually every major carrier as they would come into the Detroit yards and that Conrail's locomotive fleet was in inferior condition, specifically stating that Conrail's locomotives in the Detroit, Michigan area rail yards where Mr. Battaglia spent the majority of his career were in "terrible condition," thus exposing them and other railroad workers daily to toxic diesel exhaust fumes. Tr. of 4/23/2009 Hearing at 7-8.

On the issue of causation, Mr. Battaglia proffered the **sworn** expert testimony of his physician, Michael Kelly, M.D., who is board-certified in Internal Medicine, as well as in Occupational Medicine. Dr. Kelly stated that, in his opinion, to a reasonable degree of medical certainty, Mr. Battaglia's "ongoing and regular exposure to diesel exhaust, as a result of his work on the railroad, was a significant factor in the development of his asthma." Pet. App. 32a. In violation of Ohio Civil Rule 56, to rebut Mr. Battaglia's medical expert, Conrail submitted only **unsworn** medical reports. Even after Mr. Battaglia's counsel brought this error to Conrail's attention, Conrail did not submit sworn affidavits, as required by Ohio Civil Rule 56(e). The only proper medical evidence before the trial court was that of Mr. Battaglia's physician, who determined that diesel exposure was a "significant factor" in causing Mr. Battaglia's adult-onset-asthma. Pet. App. 32a.

Accordingly, the trial court entered summary judgment for Mr. Battaglia, concluding that prolonged exposure to diesel exhaust fumes in the cab of Conrail's locomotives established Conrail's violation of the FLIA, as well as of 49 C.F.R. § 229.43, which in turn constituted negligence *per se* under the FELA. Pet. App. 36a-37a. The court also found that the unrebutted evidence showed that this exposure

contributed to Mr. Battaglia's adult-onset-asthma.[3] Pet. App. 32a-33a.

Conrail filed a motion for reconsideration, arguing that the sworn testimony proffered by Mr. Battaglia was not sufficient to establish that Mr. Battaglia came into contact with an amount of diesel exhaust "that could be quantified" as an "exposure" for purposes of 49 C.F.R. § 229.43, even though the plain language of the regulation does not contain any exposure or other quantitative threshold. Conrail also argued that the court should have considered Conrail's unauthenticated medical expert reports. The court denied Conrail's motion for reconsideration. The case proceeded to a jury trial on Mr. Battaglia's damages. At the conclusion of trial, the jury returned a verdict of $2.6 million.

Conrail did not challenge the causation standard applicable in FLIA or FELA cases in its motion for reconsideration or in any of its post-trial motions. Similarly, Conrail's appeal to the Ohio Sixth District Court of Appeals focused on whether the trial court erroneously refused to consider unsworn medical testimony in opposition to Mr. Battaglia's summary judgment motion. As the Ohio appellate court found, the trial court properly excluded Conrail's documents from consideration because "[d]ocuments submitted in opposition to a motion for summary judgment

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[3] The FELA standard of causation applies to FLIA claims. *See, e.g., Lilly v. Grand Trunk W R Co.*, 317 U.S. 481 (1945).

which are not sworn, certified, or authenticated by affidavit have no evidentiary value [as set forth in Ohio Civil Rule 56(e)] and may not be considered by the court in deciding whether a genuine issue of material fact remains for trial." Pet. App. 11a ¶ 42. The appellate court also noted that, "since [Conrail] was given notice of the insufficiency of its proofs prior to its last response to the summary judgment motion and failed to remedy the deficiency, the trial court acted well within its discretion in denying it yet another bite of that apple" Pet. App. 12a ¶ 43.

Although this court issued *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158 (2007), well before the trial court decided the summary judgment motions, Conrail did not cite the case until its memorandum seeking discretionary review in the Supreme Court of Ohio (the Ohio equivalent to a petition for a writ of certiorari).[4] Thus, the Ohio courts had no real opportunity (let alone any reason, because this case

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[4] After issuing the first summary judgment, the parties submitted briefings on the issue of causation in the context of contributory negligence, because Conrail was seeking permission to re-open discovery and further question Mr. Battaglia's treating and expert physicians. Conrail mentioned *Sorrell* in its supplemental briefing, but the trial court did not address the issue because, again, the linchpin was the lack of rebuttal evidence presented at the summary judgment stage and Conrail's failure to follow the Ohio civil rules. In this regard, shortly after the parties submitted the briefings, the trial court entered an order specifically stating that the court's summary judgments "eliminat[ed] the issue of causation." Trial Court Order Apr. 10, 2008.

was decided based on unrebutted causation evidence) to consider Conrail's new challenge to the prevailing interpretation of FELA causation.

REASONS FOR DENYING WRIT

I. THIS CASE PRESENTS AN INADEQUATE VEHICLE TO ADDRESS ANY OSTENSIBLE CONFLICT ABOUT INTERPRETATION OF THE CAUSATION STANDARD IN FELA CASES.

Conrail asks this Court to grant certiorari to resolve an ostensible conflict among state and federal courts regarding the standard for proving causation in a FELA negligence action. Specifically, Conrail contends that a handful of state supreme courts insist that a FELA plaintiff prove traditional, common-law proximate causation, Pet. 18, 24-28, while federal courts of appeals, citing *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500 (1957), require a plaintiff to prove only that the defendant's negligence was the "slightest" cause of the plaintiff's injury. Pet. 18-22, 26-28. Conrail has exaggerated a supposed conflict, and, in any event, this case presents an inadequate vehicle to address it, as set forth below.

A. Based on the evidence, the trial court's summary judgment withstands any interpretation or standard of causation proposed by Conrail.

This case is not about fine-point distinctions between "in whole or in part" and "any part, even the slightest," or even so-called "proximate cause." As set forth above, Mr. Battaglia moved for summary judgment, and as part of his motion, he presented Dr. Keily's **sworn** affidavit stating his opinion to a "reasonable degree of medical certainty" that Mr. Battaglia's ongoing and regular exposure to diesel exhaust as a result of working on Conrail's locomotives was a "significant factor" in his development of adult-onset-asthma. In response to Mr. Battaglia's motion, Conrail disregarded Ohio Civil Rule 56(e), which required Conrail to respond with equally sworn medical testimony to survive summary judgment, and submitted **unsworn** medical testimony. Although advised that it was not in compliance with the Ohio rule, Conrail declined the opportunity to correct its mistake.

Summary judgment is not a dry run; it is the "put up or shut up" moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events. *Cox v. Ky. Dept. of Transp.*, 53 F.3d 146, 149 (6th Cir. 1995) (internal citations omitted). If the moving party satisfies its burden (there is no dispute that Mr. Battaglia satisfied such burden), then the burden of going forward shifts to the nonmoving

party to produce evidence that results in a conflict of material fact. Here, to defeat summary judgment, Conrail could not rest on mere allegations or denials, but needed to set forth specific facts showing that there was a genuine issue for trial. Ohio Civ. R. 56(e). In this regard, documentary evidence presented on summary judgment must be properly authenticated; any report or affidavit presented at the summary judgment stage must be **sworn**. *See, e.g., Citizens Ins. Co. v. Burkes*, 381 N.E.2d 963, 967-68 (Ohio App. Ct. 1978); *Green v. B.F. Goodrich Co.*, 619 N.E.2d 497, 500 (Ohio App. Ct. 1933). If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Here, there were no disputed or rebutted facts – the only admissible evidence before the trial court was Dr. Kelly's testimony that, to a reasonable degree of medical certainty, the diesel exhaust was a "significant factor"[5] in Mr. Battaglia's contracting

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[5] Conrail cites to an Ohio case, *Rhodes v Firestone Tire & Rubber Co*, No 08AP-314, 2008 WL 4368480, at *3-4 (Ohio Ct. App. Sept 25, 2008), for the proposition that an expert's statement that an alleged defect was a "significant factor" in causing a plaintiff's injury has been held to be inadequate to satisfy the requirement of traditional proximate causation. Pet. 24, n.11 In *Rhodes*, however, the court based its ruling on the fact that the expert specifically declined to conclude "to a reasonable degree of engineering probability" that the defect was a probable cause

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adult-onset-asthma. No admissible evidence before the court suggested any other causes. And none of the cases on which Conrail relies holds that evidence establishing that a railroad's negligence was a "significant factor" in causing injury is insufficient to establish the necessary degree of causation under the FELA.

Any difference between "even the slightest" causation and so-called "proximate cause" was never litigated in the trial court, nor made an issue of record at trial. In this regard, although "proximate cause" is not a concept susceptible of precise definition,[6] the great majority of courts hold that a negligent act is the proximate cause of an injury when the injury is a natural and probable consequence, which in light of the circumstances, should have been

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of the injury. In contrast, here, the expert testimony was that to a reasonable degree of medical certainty the exposure was a "significant factor" in Mr Battaglia's contracting adult-onset-asthma

[6] W Page Keeton, *et al*, *Prosser and Keeton on Torts* § 41, at 263 (5th ed 1984) (regarding the law of proximate cause, "[t]here is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion"); *accord, e g., Blue Shield of Va v. McCready*, 457 U S. 465, 478 n 13 (1982) (discussing elusiveness of test of proximate cause); *Palsgraf v. Long Island R.R. Co.*, 162 N E 99, 103 (N.Y. 1928) (Andrews, J , dissenting) ("What is a cause in a legal sense, still more what is a proximate cause, depends in each case upon many considerations. . What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.")

foreseen or anticipated. *See, e.g.*, 57A Am. Jur. 2d *Negligence* § 485; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 705 (2004).[7] Conrail never claimed that Dr. Kelly's sworn testimony, which was expressed to a reasonable medical certainty, did not satisfy this standard. And, as set forth above, no rebuttal evidence was offered showing that some other cause would have produced the injury independently of Mr. Battaglia's pervasive and prolonged exposure to diesel exhaust while working on Conrail locomotives, or that adult-onset-asthma or other injury was somehow not foreseeable as a result of such exposure.

The only proper evidence before the trial court was Dr. Kelly's sworn testimony stating to a reasonable degree of medical certainty that the exposure was a "significant factor" in Mr. Battaglia's contracting adult-onset-asthma. Pet. App. 32a. A "significant factor" is far more than the "slightest" or even a cause "in part" (which is the precise language of the FELA); even under the so-called proximate cause standard now proposed by Conrail, the outcome would have clearly been the same here. The evidence of toxic diesel exposure was astounding. Mr. Battaglia described in sworn testimony the exposure that he experienced from day one not as casual exhaust, but

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[7] And, a given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm. *Accord, e.g.*, W. Page Keeton, *et al.*, *Prosser and Keeton on Torts* § 41, at 266-68 (5th ed. 1984) (an injury may have more than one proximate cause).

as "blue smoke" and "black diesel oil" entering Conrail locomotive cabs through holes in the floors, cracks in the doors, in the seals, through the windows, and through the electrical compartment of virtually the entire fleet. Pet. App. 30a. Additionally, a fellow engineer averred in a sworn affidavit that "the locomotives which we were required to operate were rarely maintained properly causing toxic diesel exhaust fumes to come into the cab through the firewalls; electrical cabinets; and even cracks in the floor." Pet. App. 30a.

Even assuming interpretation of the causation standard were otherwise worthy of certiorari, the Court should await a case where the existence of proximate causation actually was disputed at summary judgment – that is, where the railroad actually presented competent rebuttal evidence – or at trial, and where the outcome of such dispute actually or potentially affects the outcome of the case.

B. Conrail did not press its challenge to *Rogers* and its progeny.

This Court has a long-standing prudential policy against granting certiorari to review issues that were not the basis for the decision below. This Court has said time and time again that it "ordinarily 'do[es] not decide in the first instance issues not decided below.'" *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (quoting *NCAA v. Smith*, 525 U.S. 459, 470 (1990)). This Court has deemed it "unseemly" to

disturb the finality of state judgments on a ground that the state trial court did not have occasion to consider. *See, e.g., Adams v. Robertson*, 520 U.S. 83, 90 (1997); *Webb v. Webb*, 451 U.S. 493, 500 (1981).[8]

This case falls squarely within these precedents. Given the lack of rebuttal evidence, the Ohio appellate court had no reason to consider Conrail's current argument that FELA requires proof of a type of proximate cause to establish a railroad's negligence. Although Mr. Battaglia quoted the "in the slightest" standard in his summary judgment pleadings, neither Conrail's opposition brief, nor even Conrail's reconsideration brief, disputed its application or even mentioned proximate cause. Instead, Conrail's argument focused on the trial court's decision to disregard unsworn medical testimony. **Nor** did Conrail raise the issue in its post-trial motions or in its initial brief to the state appellate court, from which it now seeks certiorari.

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[8] And, this Court has held that reviewing a state-court judgment that rests on adequate and independent state grounds is not appropriate, where, as here, the state ground is the petitioner's failure to comply with state procedural rules (here, the rule precluding reliance on unauthenticated documents at the summary judgment stage under Ohio Civil Rule 56). *See, e.g., Wolfe v. N.C.*, 364 U.S. 177, 196 (1960); *see also Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); *Penn. R. Co. v. Ill. Brick Co.*, 297 U.S. 447, 463 (1936). The reason is simple: "if the same judgment would be rendered by the state court after [this Court] corrected its view of federal laws, [this Court's] review could amount to nothing more than an advisory opinion." *Herb*, 324 U.S. at 126.

On appeal of the jury verdict, Conrail did not challenge the causation standard until its reply brief, and even then, it did not mention Justice Souter's concurrence in *Sorrell* (the focal point of its petition for certiorari). Rather, in the Ohio appellate court, Conrail focused on the state-law issues involving exclusion of the unsworn affidavits.[9] The appellate court concluded that the trial court properly excluded the unsworn testimony from consideration of the summary judgment, especially "since [Conrail] was given notice of the insufficiency of its proofs prior to its last response to the summary judgment motion and failed to remedy the deficiency." Pet. App. 12a ¶ 43.

Conrail failed to press its current claim until it sought review by the Ohio Supreme Court – and for good reason, because the issue is without moment here. As explained above, the deciding factor on causation in this case was the lack of rebuttal evidence on

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[9] Ohio Rule of Appellate Procedure 16(A)(3) requires appellants to submit a statement of the assignments of error for review. Of the nine assignments of error asserted by Conrail to the Ohio appellate court, not one challenges the standard of causation. Rather, Conrail's challenge to the trial court's summary judgment was that there was a "question of material fact" based on the "unsworn contradictory opinions of its medical experts." Pet App. 11a ¶ 41. The appellate court addressed the procedural issue and found that the trial court properly excluded Conrail's unsworn documents from consideration. Pet. App. 11a-12a ¶¶ 42-43. The appellate court did not (and had no reason to) address the issue now raised by Conrail about the interpretation or standard of causation.

summary judgment resulting from Conrail's failure to comply with Ohio Civil Rule 56(e).

II. THERE IS NO DEEP OR PERSISTENT CONFLICT ABOUT *ROGERS'* INTERPRETATION OF THE FELA.

A. Every federal court of appeals addressing the issue has followed *Rogers*.

Conrail claims a "deep and persistent" conflict over the interpretation of the FELA causation standard. Conrail argues that while some courts insist on proof of "proximate cause," others hold that FELA abrogates the common-law requirement of proximate causation. Pet. 18. This is a false dichotomy.

The federal courts of appeals **all**, without exception, read *Rogers* as making, in effect, the same broad statement that this Court made in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994); that is, "a relaxed standard of causation applies under the FELA"[10] or as modifying common-law proximate

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[10] *Moody v. Me. Cent. R.R. Co.*, 823 F.2d 693, 695 (1st Cir. 1987) ("We recognize the considerably relaxed standard of proof in FELA cases"), *Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999) ("a relaxed standard applies in FELA cases"); *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267 (3rd Cir. 1991) ("In *Rogers*, the Court held that 'the test of a [FELA] jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury.'"); *Brown v. Balt. & Ohio R.R. Co.*, 805 F.2d 1133, 1137 (4th Cir. 1986) (quoting *Rogers* as authority, for this most "lenient standard of proof" with respect to causation

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cause. *See, e.g., Nivens v. St. Louis Sw. Ry. Co.*, 425 F.2d 114, 118 (5th Cir. 1970) (quoting *Rogers* and holding that "the common-law proximate cause standard is modified, and the employee has a less demanding burden of proving causal relationship"); *Nicholson v. Erie R.R. Co.*, 253 F.2d 939, 940 (2d Cir. 1958) (quoting *Rogers* and stating that "[i]t is true that, to impose liability on the defendant, the negligence need not be the proximate cause of the injury"

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in an FELA action), *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (unanimous, *en banc*) ("Supreme Court used the term 'slightest' [in *Rogers*] to describe the reduced standard of causation between the employer's negligence and the employee's injury in FELA [] cases"); *Richards v. Consol. Rail Corp.*, 330 F.3d 428, 434 (6th Cir. 2003) ("The *Rogers* Court adopted this relaxed [causation] standard"); *Harbin v. Burlington N. R.R. Co.*, 921 F.2d 129, 131 (7th Cir. 1990) ("It is well established that the quantum of evidence required to establish liability in an FELA case is much less than in an ordinary negligence action"); *Nordgren v. Burlington N. R.R. Co.*, 101 F.3d 1246 (8th Cir. 1996) (relaxed standard for causation); *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358, 1363 (9th Cir. 1995) ("[t]he standard for receiving a jury trial is less stringent in FELA cases than in common law tort cases"); *Summers v. Mo. Pac. R.R. System*, 132 F.3d 599, 606 (10th Cir. 1997) (quoting *Rogers* at length); *Thibodeaux v. Tex. E. Transmission Corp.*, 548 F.2d 581, 587 n.12 (5th Cir. 1977) (pre-split, and thus binding in the 11th Cir.) ("Under the Jones Act, 46 U.S.C. § 688, the test for liability is whether 'employer negligence played any part, even the slightest, in producing the injury' ") (quoting *Rogers*); *Brooks v. Wash. Terminal Co.*, 593 F.2d 1285, 1288 (D.C. Cir. 1979) ("The test whether an F.E.L.A. case should be submitted to the jury 'is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' ") (quoting *Rogers*)

because the FELA "has its own rule of causation"). And Conrail fails to identify a single post-*Rogers* decision from this Court even intimating that *Rogers* was incorrectly decided.

B. *Rogers* is consistent with the FELA decisions that came before it.

Conrail also seeks to evade *Rogers* by portraying this Court's pre-*Rogers* FELA jurisprudence as applying traditional notions of proximate causation. The fact that pre-*Rogers* decisions use the term "proximate cause" in FELA cases provides no insight into the meaning of that term, because not until *Rogers* was this Court given the opportunity to address the appropriate causation standard for railroad negligence. In all of the earlier decisions, the Court's use of that term was not essential to its decision. Moreover, when the Court referenced proximate cause in its *pre-Rogers* decisions, it did not give the term the meaning that Conrail attributes to it.

For example, *Rogers* cites *Coray v. Southern Pacific Co.*, 335 U.S. 520 (1949), which suggested an FELA plaintiff must show that the railroad's negligence was the proximate cause of his injuries, for the proposition that railroad negligence need only have "played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 523; *Rogers*, 352 U.S. at 506 & n.11. In *Coray*, this Court reversed a judgment in favor of a railroad, despite the tenuous causal connection between the

railroad's negligence and the employee's injury, a connection that the state supreme court described as merely philosophical and not substantial. *Coray*, 335 U.S. at 523. This Court explained that the FELA "declares that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from" the railroads' negligence, and therefore it "has commanded that if a breach of [its duty of care] contributes in part to an employee's death, the railroad must pay damages." *Id.* at 524. This Court cited *Coray* in *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434-35 (1949), for the proposition that an FELA plaintiff may prevail by presenting evidence that the railroad's negligence was a "contributory proximate cause."[11] *Id.* Likewise, in *Schulz v. Penn. R.R. Co.*, 350 U.S. 523, 526 (1956), a Jones Act case,[12] this Court reversed a directed verdict in favor of the employer, noting that "[f]act finding does not require mathematical certainty" and liability may be imposed if the injury or death "resulted 'in whole or in part' from [the employer's] negligence." *Id.*

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[11] This, of course, directly contradicts Conrail's suggestion that railroad negligence must be "the" proximate cause, as opposed to "a" proximate cause. *Coray* and *Carter* are irreconcilable with Conrail's theory that common law principles govern FELA causation

[12] Cases brought under the Jones Act, the federal law governing liability for workplace injuries to seamen, use the same standards and judicial interpretations that apply to the FELA. *Am. Dredging Co v Miller*, 510 U.S. 443, 455-56 (1994)

Years before *Rogers*, courts concluded that this Court's use of the term "proximate cause" in the early FELA cases deviated from the traditional definition of the term. As that Seventh Circuit explained:

> Perhaps the reconciliation of the earlier accepted, sometimes called the old-fashioned idea, of 'proximate cause' as the direct or efficient cause of the accident . . . in cases where [the FELA] applies, and the conception of proximate cause which now obtains, is to be found in the enlarging phrase of the statute. * * * Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'causal relation,' – if the injury or death resulted 'in part' from defendants' negligence, there is liability. The words 'in part' have enlarged the field or scope of proximate causes in these railroad injury cases.

Eglsaer v. Scandrett, 151 F.2d 562, 565-66 (7th Cir. 1945). Indeed, this Court, as well as lower courts, already recognized that the traditional understanding of proximate causation was inconsistent with the FELA's negligence scheme long before *Rogers*.[13]

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[13] For example, the Second Circuit found early on that proximate causation "in cases where the liability depends upon a failure of foresight" by the railroad should be further refined, such that a railroad would be liable where "the chain of events

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C. Any difference found in a handful of state supreme courts between the FELA language ("in whole or in part") and the *Rogers* interpretative language ("even the slightest") is mere semantic discrepancy.

At most, the variant applications of *Rogers* by a handful of state supreme courts are attributable to "different verbal formulations of the same underlying legal rule." Stephen G. Breyer, *Reflections on the Role of the Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006). These are not "actual divides among the lower courts" but merely "minor linguistic discrepancies" that "are not outcome determinative." *Id.*; *accord* R. Stern, E. Gressman, S. Shapiro and K. Geller, *Supreme Court Practice* 225 (8th ed. 2002) (to justify certiorari, "there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized"). In this regard, the "semantic difference" between the handful of state supreme court opinions that Conrail cites to in its Petition has not led to conflicting results; for the most part, these are merely "minor variations" that stem from the state supreme courts' "reword[ing]" of this Court's holdings. *Wash. v. Klem*, 497 F.3d 272, 279 (3d Cir. 2007).

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which resulted in plaintiff's injuries were not . beyond calculable foresight." *Cusson v. Can. Pac. Ry. Co* , 115 F.2d 430, 432 (2d Cir 1940) (Hand, J.)

Two state court decisions cited by Conrail appear to read *Rogers* more narrowly than the federal courts of appeals. *See, e.g., Marazzato v. Burlington N.R. Co.*, 817 P.2d 672, 674 (Mont. 1991) ("*Rogers* case was addressing the issues of multiple causes and contributory negligence after it had been established that the employer was negligent"); *Raab v. Utah Ry. Co.*, 221 P.3d 219, 228-30 (Utah 2009) (rejecting the argument that *Rogers* requires only "but for" causation; "[w]hile one could certainly read the Supreme Court's language in *Rogers* to speak to the standard of causation under FELA, this is not the best reading of the case"). The bottom line in *Raab*, so far as it concerns *Rogers*, is that *Rogers* did not do away with all causation except "but for" causation. *Raab*, 221 P.3d at 228-30. Even the *Raab* court, while rejecting mere "but for" causation, applied what can only be described as a relaxed standard of legal causation. In that case, a defective brake forced replacement of the lead locomotive, which in turn required plaintiff to enter a trailing locomotive to set the controls, where he hit his head on a low-hanging air conditioning unit. The court held that the jury was entitled to find that the defective brake "was a proximate cause" of plaintiff's injury. 221 P.3d at 222, 231. For the sake of clarity, the *Raab* court said it was rejecting the notion that only "but for" causation is required, not the relaxed causation standard.[14] In short, there is no

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[14] The *Raab* court contrasted its conclusion on this point with that of the Tenth Circuit in *Summers v. Mo. Pac. R.R. Sys.*,

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conflict among the lower courts in practice: Conrail does not cite a single case in which the "relaxed" standard was rejected in favor of what Conrail calls traditional "proximate cause."[15, 16]

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132 F.3d 599, 606 (10th Cir. 1997). *Raab*, 221 P.3d at 228-29 ¶ 32 & n.35. But what the *Summers* court found "definitely abandoned" in *Rogers* was the practice of "analyz[ing] liability under the FELA in terms of proximate causation." *Id.* (emphasis supplied). Neither *Summers*, nor any other case so far as we can tell, suggests that *Rogers* abandoned the concept that some "but for" causes are, for policy reasons, too remote to support liability.

[15] Indeed, several of the cases cited by Conrail cite *Rogers* as the standard by which "proximate cause" is measured. *Gardner v. CSX Transp., Inc.*, 498 S.E.2d 473 (W. Va. 1997), expressly declared that *Rogers* "established" "[t]he causation standard in FELA cases," and went on to quote *Rogers* "even the slightest" language. *Id.* at 482. The same is true of *Snipes v. Chi. Cent. & Pac. R.R. Co.*, 484 N.W.2d 162, 164-65 (Iowa 1992), which quotes *Rogers*' "even the slightest" language in order to show "[t]he liberality with which the Supreme Court has applied this test," *i.e.*, of FELA negligence and causation. Much the same is true of *Chapman v. Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991) ("An action brought under the Federal Employers' Liability Act must be submitted to a jury if the jury could reasonably find that "employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought.") (quoting *Rogers*); *accord Crafton v. Union Pac. R. Co.*, 585 N.W.2d 115, 123 (Neb. 1998) ("The quantum of evidence required to establish liability in a FELA action is lower than that required in an ordinary negligence action. The common-law standard of proximate cause is not applicable to FELA." (citations omitted)).

[16] Conrail's citation to *Reed v. Pennsylvania R. Co.*, 171 N.E.2d 718 (Ohio 1961), is particularly misleading. First, the proposition advanced by the railroad is contained in a footnote in *Reed* and is dictum. Second, and more importantly, the Ohio

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III. ON THE MERITS, THE STANDARD FOR CAUSATION UNDER FELA IS RELAXED.

In response to the horrific number of injuries that were occurring on a regular basis in the railroad industry, Congress, in 1906, enacted a precursor to the FELA. 40 Cong. Rec. 4607 (1906). In enacting the FELA, Congress implemented a system that moved railroad-worker protection away from the traditional common law and closer to the workers' compensation model. *See* 45 U.S.C. §§ 51, 53. Significant features of Congress' proposed new Act included its creation of liability for any injury "resulting in whole or in part" from the employer's negligence and abrogating the defense of pure contributory negligence, which previously barred a plaintiff's recovery if his negligence played any role in his injuries. *See* 45 U.S.C. §§ 51, 53. These features of the FELA reflected Congress' goal to shift financial responsibility for injured railroad workers from those least able to carry that burden; from the worker and their families, to the railroads. *See Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 161 (2003); *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994).

Congress rejected numerous attempts to introduce features to the FELA that would limit this

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Supreme Court supplanted *Reed* in *Vance v. Consolidated Rail Corp*, 652 N.E 2d 776, 782 (Ohio 1995) ("we are bound to follow the unique body of federal decisional law interpreting the FELA") In almost 40 years, no other court has cited the *Reed* decision for the proposition advanced by Conrail in its Petition.

remedial function. *See, e.g.*, H.R. Rep. No. 60-1386, at 79, 80 and 92 (1908). Consistent with these goals, Congress amended the FELA in 1939 to ensure the financial protection of injured railroad workers by expanding the class of covered employees, eliminating the defense of assumption of the risk and penalizing intimidation of workers who provide information about accidents and other incidents. *See* 45 U.S.C. §§ 51, 54, 60. Congress adopted the 1939 amendments in order to ensure that the goal of expanding compensation for workers was not thwarted by judicial introduction of common law concepts into the statute. *See Rogers*, 352 U.S. at 508-09. At the same time, and for the same reason, Congress expressly declined a revision to the FELA that would have equated the "in whole or in part" language of section 1 with proximate cause.[17]

The 1939 amendments show Congressional intent to clarify that the FELA departs from the

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[17] *Compare* 42 Cong. Rec 10,710 (1939) (proposed amendment in 1939. "In any action brought against any common carrier . such employee shall not be held to have the risks of his employment in any case where . . . the negligence of such common carrier, its officers, agents, or employees, *proximately contributed* to the injury or death of such employees.") (emphasis added) *and* H.R. Rep No 75-2153, at 1 (1938) (similar proposed amendment in 1938) *with* 45 U S.C. § 54 ("In any action brought against any common carrier . . such employee shall not be held to have assumed the risks of his employment in any case where such injury or death *resulted in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier . . ") (emphasis added).

common law and undermine reliance on pre-1939 FELA decisions that ostensibly adopt a common law proximate cause approach. And, in the wake of *Rogers* and federal circuit law broadly interpreting *Rogers*, Congress has not taken any action to amend the "in whole or in part" language. As the Seventh Circuit Court of Appeals recently noted:

> We will not assume that Congress is unaware of the judicial gloss that the [FELA] has received. If the Act as it has been interpreted and applied does not correctly reflect what was intended by the legislative branch then the change must be made there. The duty of this court is to follow what is now well-established authority.

Heater v. Chesapeake & Ohio Ry. Co., 497 F.2d 1243, 1246 (7th Cir. 1974).

To interpret the FELA as requiring strict adherence to traditional proximate cause would be inconsistent with the "humanitarian purposes" at the FELA's core, as it would push railroad workers closer to the traditional common law scheme that Congress was seeking to avoid. *See Gottshall*, 512 U.S. at 542-43. In the intervening decades, this Court has consistently recognized that Congress' avowedly beneficial purpose in enacting the FELA requires a policy of liberal interpretation so as to accomplish that

purpose. *See, e.g., Rogers*, 352 U.S. at 508-510;[18] *Urie v. Thompson*, 337 U.S. 163, 180 (1949);[19] *see also Gottshall*, 512 U.S. at 543.

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[18] Conrail also argues that *Rogers* speaks only to issues of multiple causation. Although *Rogers* certainly addressed the role of plaintiff's contributory negligence, it did so only in the broader context of what evidence was necessary to present a jury question on whether a defendant's negligence caused plaintiff's injury. Any suggestion that only comparative negligence was at issue in *Rogers* is, quite simply, incorrect.

[19] Conrail attempts to find in *Urie v. Thompson*, 337 U.S. 163 (1949), a hard and fast rule that the FELA adopted then existing common law except where otherwise stated (Pet. at 26 n.13); but the *Urie* Court looked, not merely to the common law, but also to another contemporaneously enacted statute, *id.* at 184, "the spirit the statute [the FELA] contemplated for its administration and application," *id.* at 186, "the breadth of the statutory language, the Act's humanitarian purposes, its accepted standard of liberal construction in order to accomplish those objects, the absence of anything in the legislative history indicating a congressional intent to require a restricted interpretation or expressly to exclude such occupational disease, and the trend of existing authorities dealing with the question. . . ." *Id.* at 181. This last point is worth additional attention. Citing just four lower court cases, "[n]ot all of [which] could be sustained" under Conrail's interpretation, the *Urie* Court wrote: "We would be most hesitant to adopt a construction of 'injury' as used in this Act which would overrule the decisions last cited or seriously impair their authority." *Urie*, 337 U.S. at 186.

IV. THERE IS NO REASON TO GRANT THE PETITION FOR CERTIORARI TO CONSIDER THE OHIO COURT OF APPEAL'S READING OF 49 C.F.R. § 229.43.

Section 229.43 of the Code of Federal Regulations, Title 49, provides:

> Products of combustion **shall** be released **entirely outside the cab** and other compartments. Exhaust stacks shall be of **sufficient height**. . . . to prevent entry of products of combustion into the cab . . . under usual operating conditions.

49 C.F.R. § 229.43 (emphasis added). Conrail argues that the Ohio appellate court wrongly found that Conrail violated § 229.43 by permitting infiltration of diesel exhaust into its locomotives, before the diesel exhaust ever even reached the exhaust stacks, without regard to whether *enough* diesel exhaust entered the locomotive to violate specific exposure levels set by OSHA. According to Conrail, the regulation is only violated if OSHA "permissible exposure levels" are exceeded, and the Ohio courts' contrary construction of the regulation conflicts with decisions of this Court commanding deference to the Federal Railroad Administration's supposed administrative construction of the regulation. Conrail's argument is off the mark.

The Ohio appellate court specifically held:

> The plain language of the rule is more persuasive. Although [Conrail] argues that the

> thrust of the rule is about stack heights, it is clear that the intent of the rule is to protect occupants of a locomotive cab from exposure to toxic exhaust emissions during normal operating conditions. It is directed that such exhaust be released entirely outside the cab and that the railroad shall vent the exhaust through stacks of sufficient height or provide 'other means' to prevent the exhaust from entering the cabin in normal operation. We see no ambiguity here.

Pet. App. 10a ¶ 38. The Ohio court did not disregard Supreme Court precedent on deference to agency construction of a regulation. Rather, the court followed the principle, clearly established by this Court, that a court may **not** accept a purported administrative construction of a regulation that conflicts with the regulation's unambiguous terms. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 513 (1994) (deference to administrative agency is appropriate "unless 'an alternative reading is compelled by the regulation's plain language' ").

Conrail's real objection to the Ohio court's ruling is not that it conflicts with precedents of this Court; rather, Conrail's disagreement is with the lower court's reading of this particular regulation, which is a subject this Court has never spoken to, and thus is not a subject on which it is possible for there to be a "conflict" with this Court's prior rulings. Not only does Conrail point to no conflict with any of this

Court's rulings, it points to no other appellate decision in any jurisdiction construing 49 C.F.R. § 229.43 in a way that conflicts with that of the Ohio courts; indeed, it points to no other appellate decisions interpreting the regulation in any way. Conrail's argument is merely that one intermediate state appellate court has rendered a reading of a regulation based on the plain language of the regulation, with which Conrail disagrees. A claim of mere error of a lower state court, on an issue apparently never before litigated at the appellate level does not come close to meriting review under Supreme Court Rule 10.

In any event, Conrail's claim that the lower court erred in construing the plain language of the regulation is not persuasive. Conrail makes virtually no effort to square its contention that the regulation is violated only if OSHA's diesel exposure limits are violated with the unambiguous text of the regulation, which nowhere mentions the level of exposure and instead provides clearly: "[p]roducts of combustion **shall** be released **entirely outside the cab** and other compartments." 49 C.F.R. § 229.43 (emphasis added). And even if there were some room for interpretation of the language, the purported administrative construction on which Conrail relies (a report to Congress) is not one that is entitled to deference. *Accord, e.g., Christensen v. Harris County*, 529 U.S.

576 (2000).[20] The Ohio appellate court understood the "interpretation" of the regulation proffered by Conrail cannot trump the plain and unambiguous meaning of the regulation.

Conrail's concern that application of the plain language of the regulation would make it "virtually impossible for railroads to defend" unless the cab of the locomotive is "airtight" (Pet. 30), is fanciful. A single intermediate state court ruling is an exceedingly slender basis for Conrail's predictions of the tremendous difficulties that it sees in application of the plain language of the regulation. Moreover, Conrail exaggerates the effect of the ruling by overlooking that to establish liability, a worker will still need to establish not only that diesel fumes entered a

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[20] *Christensen v Harris County*, 529 U.S 576 (2000), teaches:

> Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron* [*U.S.A , Inc v. Natural Res Def Council, Inc.*, 467 U S 837 (1984)] – style deference. . . . [they] are 'entitled to respect' . . . but only to the extent that they are persuasive, . . . which is not the case here * * * [and] deference [to an agency's interpretation of its regulation] is warranted only when the language of the regulation is ambiguous The regulation in this case, however, is not ambiguous . . .

529 U S. at 579; *see also United States v. Mead Corp.*, 533 U S 218 (2001)

locomotive in violation of the regulation, but also that exposure to those fumes was a cause of actual, compensable injuries.

And, here, as perhaps has been belabored above, the unrebutted evidence established that the diesel exhaust exposure on the Conrail locomotives that Mr. Battaglia worked was egregious (*see supra* note 2, explaining that the Conrail locomotives at the Detroit, Michigan yard were in particularly bad condition). Diesel exhaust was coming into the locomotive cabs from bulk head electrical cabinets and cracks in the floor and firewalls, and then, as a matter of course, the exhaust was **not** being "released entirely outside the cab and other compartments." Some diesel exhaust **was not even making it into the stacks**; diesel exhaust was being released directly into the locomotive cab. Pet. App. 30a. Furthermore, those fumes that **were** making it out of the stacks were being carried back in through the cracks in the seals around the windows and doors because the "exhaust stacks (were not) of sufficient height" to prevent their entry into the cab, in addition to the seals which were worn out and malfunctioned permitting fumes to come back in. This is much more than exposure to merely some fumes, and goes well beyond the locomotive cab merely being not "airtight." If there is any reason to go beyond the plain language of

section 229.43 in order to avoid potential burden to the railroads, this is not the case to do so.[21]

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[21] Conrail's suggestion in footnote 16 that Mr. Battaglia was required to present "quantitative evidence" is troublesome. *Hardyman v. Norfolk & W. Ry Co.*, 243 F.3d 255 (6th Cir. 2001), teaches, in an FELA case involving carpal tunnel syndrome

> We further recognize that it makes little sense to require a plaintiff to establish a dose/response relationship or threshold level in a situation where there has been no scientific study conducted specifically on railroad brakemen and where the dose/response relationship or threshold level will always vary from individual to individual. Such a requirement essentially would foreclose plaintiffs from recovering for [an injury] against negligent employers unless their particular job has been the subject of a national, epidemiological study on [that injury].

243 F.3d at 265 Conrail asks this Court to read into a regulation a quantitative evidence requirement not only that is nowhere in the regulation itself, but also that cannot be met. There was no evidence of any national, epidemiological studies relative to diesel exhaust proffered by Conrail in this case. Neither the FRA nor OSHA apparently has performed any such studies on Conrail locomotives. And Conrail has not cited to any testing that it has ever performed or permitted on any of its locomotive fleet, much less on its fleet in the Detroit, Michigan area.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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